STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TION TERRELL, Defendant-Appellant.	UNPUBLISHED April 1, 2014 No. 303717 Wayne Circuit Court LC No. 08-001533-FC

ON REMAND

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

A remand from our Supreme Court brings this case before us for a third time.[1] Following a jury trial, defendant was convicted of assault with intent to commit murder (AIM), MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b. The trial court imposed a sentence of ten years in prison for the felony-firearm conviction, to be served consecutively to concurrent sentences of 20 to 50 years for the AIM conviction and 2 to 5 years for the felon-in-possession conviction. In response to the Supreme Court's remand order, we now reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

In *People v Terrell*, 289 Mich App 553, 555-556; 979 NW2d 684 (2010), this Court summarized the facts underlying the case:

> This case arises from the nonfatal shooting of Deshawn Evans on October 28, 2007. On that date, Evans was on Yacama Street in Detroit, Michigan. Evans's friend, Dana Hudson, was sitting in Hudson's car having a friendly conversation with Evans. A few minutes later, another man, Reginald Myers,

[1] *People v Terrell*, 495 Mich ___ (2013).

> drove onto Yacama Street, and Evans and Myers had an argument. According to Evans, during or shortly after the argument with Myers, he received a telephone call from Derrick Steward, whose nickname was "Twin." Twin informed him that he could come over and retrieve his cell phone charger. Evans testified that he left to retrieve his charger and that as he left, he saw defendant, who was also his friend, turning onto Yacama Street in a white Impala. Although Evans asserted that he left to retrieve the cell phone charger from a home on Coventry Street and denied that he went to the home to obtain a gun, a defense witness testified that Evans came to the home and "basically asked everybody that was there" "for a pistol, a gun." The witness testified that Twin gave Evans a gun. According to Evans, he returned to Yacama Street about 30 to 45 minutes later. Evans testified that when he returned, defendant hit him in the face and head with a gun and then shot him twice, and Myers also shot him in both thighs. Another witness, who lived on Yacama Street, testified that after the shooting, a man drove up in a car, approached the victim, and asked: "'What I want to know is where's the gun. I know he had a gun because I gave him one.'" According to Evans, after they shot him, defendant and Myers ran to Hudson's car, and the men drove off, with Hudson driving. [Footnotes omitted.]

Defendant and Hudson were tried together. Evans testified that defendant shot him twice in the chest, that Myers shot him in both legs, and that he heard a total of four gunshots. Defendant insisted on testifying, but defense counsel asked only his name, his date of birth, and whether he was a person. Hudson invoked his Fifth Amendment privilege against self-incrimination and did not testify. Defendant was convicted, but Hudson was acquitted.

Defendant moved for a new trial on the basis of newly discovered evidence. At the hearing on the motion, what defendant presented as newly discovered evidence included the testimony of codefendant Hudson, who was now willing to testify. Hudson stated that Myers, not defendant, had shot Evans. Hudson also stated that after the shooting, he drove away alone in his car. The trial court concluded that "although the testimony was not newly discovered evidence, it was not available to defendant at the time of trial." The court granted the motion on the basis of the testimony that Hudson was now prepared to offer.

The prosecution appealed to this Court on leave granted. This Court reversed, concluding that "while Hudson's proffered testimony was newly available evidence, it was not newly discovered evidence sufficient to warrant a new trial." *Terrell*, 289 Mich App at 560. Our Supreme Court denied leave to appeal. *People v Terrell*, 489 Mich 858 (2011). Defendant then claimed an appeal from his reinstated convictions, predicated in part on allegations of ineffective assistance of counsel. This Court granted a motion to remand the case to the trial court for an evidentiary hearing[2] to further develop the issue of defense counsel's effectiveness.

Defendant's assertions of deficient performance by defense counsel included that counsel had failed to honor his desire to testify by having asked him no questions about the shooting.

[2] See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant also claimed that counsel had failed to consult and call an expert to testify regarding the number of times Evans was shot. Defendant cited medical records indicating that Evans had received only one shot to the chest and one to the legs, in contrast to Evans' account of having been shot four times.

The trial court concluded that defense counsel's performance did not fall below a reasonable level of competence, and thus ruled that a new trial was not warranted. The trial court noted that defense counsel testified that defendant had admitted to him that he had shot the victim with a .45-caliber revolver; however, defendant denied having made any such admission to counsel. The court specifically discredited defendant's testimony and credited that of counsel concerning their conversations with each other. The court held that defense counsel had properly taken steps to ensure that he would not elicit perjury from defendant. The court additionally held that the defense had nothing to gain from calling an expert to confirm the "obvious" indications in the medical records concerning how many times the victim was shot.

After the remand, this Court affirmed defendant's convictions. See *People v Terrell*, unpublished opinion per curiam of the Court of Appeals, issued January 31, 2013 (Docket No. 303717). With respect to defendant's and defense counsel's differing accounts of their discussions, this Court noted that it was bound to defer to the factfinder's credibility determinations, and concluded that the trial court did not err by crediting the testimony of defense counsel at the *Ginther* hearing. *Terrell*, unpub op at 2-3.

Defendant again sought leave to appeal in the Supreme Court, which, in lieu of granting leave, reversed the trial court's determination that defense counsel testified credibly at the *Ginther* hearing as clearly erroneous. The Supreme Court also reversed the trial court's determination that "defendant's trial attorney made a valid strategic decision not to present expert testimony regarding the number of times that the complainant was shot." *People v Terrell*, 495 Mich ___ (2013). The Supreme Court thus vacated those parts of this Court's opinion relying on that credibility determination, "including the holding that the decision not to present expert testimony was a legitimate trial strategy." The Supreme Court remanded the case to this Court for reconsideration of defendant's claim of ineffective assistance of counsel in light of its order, but in all other respects denied leave.

II. ANALYSIS ON REMAND

The Supreme Court included with its remand order a reiteration of the standards for evaluating a claim of ineffective assistance of counsel:

> To establish ineffective assistance of counsel, a defendant must show: (1) that the attorney's performance was not based on strategic decisions, but was objectively unreasonable in light of prevailing professional norms; and (2) that, but for the attorney's error, a different outcome was reasonably probable. This is a mixed question of law and fact. Findings of fact are reviewed for clear error; questions of law are reviewed de novo. [*Id.* at ___, citing *People v Armstrong*, 490 Mich 281; 806 NW2d 676 (2011).]

Defendant predicated his claim of ineffective assistance of counsel on various grounds, but the Supreme Court called for reconsideration of only those that implicated defense counsel's credibility at the *Ginther* hearing in general, and the conclusion that there was a legitimate strategic reason to forego calling an expert to testify concerning the number of times the victim had been shot in particular. The Supreme Court's determinations that defense counsel did not testify credibly at the *Ginther* hearing, and that the decision to forego calling an expert was not legitimate trial strategy, are settled matters standing as law of the case.[3]

Concerning the latter, as this Court earlier noted, the medical evidence supported the theory that the victim was shot twice, including just once in the chest, and a police officer testified that only two shell casings were recovered from the scene, both from a nine-millimeter gun. *Terrell*, unpub op at 3, 5. It seems probable that an expert would have confirmed that the medical records indicated that only two gunshots caused the victim's wounds, which would have refuted Evans's account whereby both defendant and Reginald Myers shot him twice. Such expert testimony would have comported with defendant's theory, as revealed at the *Ginther* hearing, that Myers shot the victim twice with Evans's own nine-millimeter gun, and defendant did not shoot him at all. See *id*. at 3. An expert might also have confirmed that the medical evidence better supported the theory that one gun fired both shots, or that the offending weapon was more likely the nine-millimeter gun associated with Evans and Myers than any gun defendant was alleged to have possessed.

The prosecuting attorney argued, over no objection, that the medical records indicated that the victim's wounds had been caused by more than two bullets. But the expert at the *Ginther* hearing opined that the wounds were caused by just two gunshots, and on appeal the prosecution admits that its argument to the contrary at trial was a misstatement. It seems likely that, had an expert specified that the medical evidence indicated just two gunshots, the prosecuting attorney would not have erroneously argued otherwise, or at least defense counsel would have more likely felt emboldened to object to such argument.

With regard to defense counsel's disinclination to elicit from defendant his version of the events in question, our Supreme Court has instructed that counsel's testimony at the *Ginther* hearing lacked credibility. This prevents us from considering whether counsel's explanation that defendant had admitted shooting Evans provided a sound strategic or ethical basis for counsel's decision to honor defendant's choice to testify by asking only a few questions about mundane matters not in controversy.

The decision whether to testify is ultimately a criminal defendant's to make personally, and counsel must respect that decision. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97

[3] Under the doctrine of law of the case, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995).

L Ed 2d 37 (1987).[4] In this case, our Supreme Court's determination that defense counsel lacked credibility leaves unrebutted defendant's *Ginther* hearing testimony that he would have testified at trial that Reginald Myers shot the victim twice, and that he did not shoot the victim at all. See *Terrell*, unpub op at 3.

The prosecution argues that a valid strategic reason for severely limiting defendant's testimony on direct examination is apparent even without resort to defense counsel's explanation that he was taking pains to avoid presenting perjury. The prosecution suggests that a defense attorney concerned that the jury will not find his or her client credible might confine direct examination to token questioning in hopes that the prosecuting attorney in turn will refrain from attempting vigorous cross-examination for fear of eliciting testimony favorable to the defense. According to the prosecution, a defense attorney might do this in order to lead the jurors to believe that while the defendant is willing to testify, the prosecutor does not want the defendant's side of the story told. We find this creative theory too speculative to adopt. Accordingly, we conclude that defense counsel's failure to elicit defendant's version of the events deprived him of an important and likely effective defensive tool.

At issue, then, is whether a different outcome would have been reasonably probable had defense counsel engaged an expert witness regarding the number of times Evans was shot and elicited from defendant his version of the events at issue. We conclude that, had counsel engaged such an expert and elicited from defendant his version of the events, the jury likely would have been left with a reasonable doubt regarding whether defendant shot Evans. Expert testimony on what the medical records revealed would have harmonized with, and strengthened, defendant's account of Myers being the lone shooter. It also would have discredited Evans's account of being shot by both defendant and Myers, and particularly his insistence that defendant shot him twice in the chest.

Furthermore, it is apparent that the jury's conclusion that defendant shot Evans formed the basis for its conclusion that defendant also committed the gun-possession offenses at issue in this case. Thus, a reasonable doubt concerning whether defendant shot Evans might well have left a reasonable doubt concerning whether defendant possessed a firearm at the time in question.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

[4] But see *People v Toma*, 462 Mich 281, 308-309; 613 NW2d 694 (2000) (where a defendant insisted on testifying, counsel's failure to ensure that the jury fully understood the defendant's account of events did not constitute ineffective assistance because that account was "so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to say").